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Responsible Official

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Bog Creek Road EIS

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Re: Comments re Draft Environmental Impact Statement for the Bog Creek Road Project #41296

To Whom it May Concern:

In May 2016, the undersigned groups submitted scoping concerning the repair and maintenance of Bog Creek Road and closure of certain roads within the Blue-Grass Bear Management Unit in the Selkirk Mountains in Boundary County, Idaho. These groups all have a substantial interest in this proposal given its potential impacts to wildlife, including grizzly bears, Woodland caribou, and Canada lynx, all listed under the Endangered Species Act ("ESA"). Due largely to concerns about the impact of repairing and opening Bog Creek Road, the undersigned groups opposed the project proposal.

Now, the Forest Service ("USFS") and U.S. Customs and Border Protection ("CBP") (collectively, "the Agencies") have released a Draft Environmental Impact Statement ("DEIS")

that expands and alters the proposal in a manner that will cause even greater harm to sensitive wildlife in the project area.¹ For example, the Proposed Action during scoping in May 2016 would maintain season restricted designations on Bog Creek Road and Blue Joe Creek Road, limiting administrative motorized access to 57 trips per active bear year.² Now, suddenly, the Agencies have determined that a seasonally restricted designation would not be sufficient to ensure border security in the area, and thus have removed the seasonally restricted designation for Bog Creek Road from all alternatives.³ Furthermore, the Agencies have now determined that it is necessary to remove the seasonally restricted designation from the Blue Joe Creek Road to “better allow the agency to meet the Access Amendment standards and their legal obligation to provide access to private property within the Blue-Grass BMU.”⁴ What the Agencies fail to provide is information as to why CBP suddenly feels it needs year-round, unlimited access on these roads, and why the Agencies feel it needs to open Blue Joe Creek Road to allow private property owners to access the Continental Mine when the Agencies have seemingly met the requirement to provide access to the mine with a seasonal restriction on Blue Joe Creek Road in the past. What is apparent is that the Agencies listened to the concerns of CBP and private property owners and ignored the concerns of environmentalists who wish to protect wildlife and wildlife habitat in this region. Moreover, while the Agencies assert that CBP needs continuous access to the border via Bog Creek Road and Blue Joe Creek Road to deal with “legitimate threats,” there is no discussion anywhere in the DEIS as to what these legitimate threats might entail.⁵

For the reasons described herein, we believe that the DEIS fails to comply with law and we support the No Action Alternative.

I. CBP’s Vegetation Removal Work on Bog Creek Road Was Performed Illegally

A. The Agencies Have Violated NEPA By Conducting Work on Bog Creek Road Before Completing a NEPA Analysis

The Agencies held two scoping periods to evaluate the proposal to repair and maintain Bog Creek Road: one in 2013 and one in 2016.⁶ In response to scoping, the Agencies received several comment letters, including from environmental groups opposing the project. Without completing the required analysis under the National Environmental Policy Act, CBP went forward and conducted vegetation-clearing activities on the eastern portion of the Bog Creek

¹ U.S. Department of Homeland Security, U.S. Customs and Border Protection & U.S. Department of Agriculture, Idaho Panhandle National Forest, Bonners Ferry and Priest Lake Ranger Districts, Draft Environmental Impact Statement, Bog Creek Road Project (June 2018) (hereinafter, “DEIS”).

² *Id.* at 36.

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 6.

⁶ *Id.* at Executive Summary, xv.

Road corridor in 2016.⁷ According to the DEIS, “[v]egetation removal was performed on an approximately 6-foot-wide x 1-mile-long corridor on the east end of the roadway.”⁸ It is unclear if there was any public notice or an opportunity to comment before this “vegetation removal” was performed, and it is completely clear that no NEPA analysis was approved or completed before CBP undertook these activities on public lands. What is clear is that the Agencies have taken the first steps in repairing Bog Creek Road, as proposed in the DEIS, before the NEPA analysis is complete.

NEPA’s twin objectives are (1) to ensure that agencies take a “hard look” at every significant aspect of the environmental impact of a proposed action, and (2) to guarantee that relevant information is available to the public to promote well-informed public participation. “NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken.” 40 C.F.R. § 1500.1(b) (emphasis added). An agency cannot take any action or make any commitment of resources before making its final decision that would have an adverse environmental impact or prejudice or limit the choice of reasonable alternatives. Id. §§ 1502.2(f), 1506.1(a). Thus, NEPA requires that an agency take a “hard look” at the impacts of its actions before the point of commitment so that it does not deprive itself of the ability “to foster excellent action.” See id. § 1500.1(c). Thus, agencies must commence the NEPA process “at the earliest possible time to insure that planning and decisions reflect environmental values.” Id. § 1501.2. In this way, NEPA ensures that the agency will not act on incomplete information only to regret its decision after it is too late to correct.

CBP’s work on the Bog Creek Road is a clear violation of NEPA. Before completing this work, CBP failed to conduct any NEPA. CBP did not prepare an environmental impact statement, an environmental assessment, a finding of no significant impact, or a categorical exclusion for the road work. CBP failed to take the requisite “hard look” at the environmental impacts of its decision, including by properly involving the public and by studying the direct, indirect, and cumulative impacts of its actions, and alternatives that might be less environmentally destructive.

We request that the Agencies complete a supplemental environmental impact statement for the work already completed on Bog Creek Road. Agencies must prepare supplements to either draft or final EISs when the agency makes substantial changes in the proposed action that are relevant to environmental concerns or when there are significant new circumstances or information relevant to environmental concerns bearing on the proposed action or its impacts. Id. § 1502.9(c)(1). CBP must prepare a supplement environmental impact statement on the work completed on Bog Creek Road, which reflects a change in the proposed action and significant new information.

⁷ Id. at 2.

⁸ Id.

B. The Agencies Have Violated the Endangered Species Act By Conducting Work on Bog Creek Road

CBP's work on the Bog Creek Road is also a violation of the Endangered Species Act ("ESA"), because CBP failed to consult with the Fish and Wildlife Service on the impacts of its actions on grizzly bears, Woodland caribou, Canada lynx, and bull trout – all of which are federally listed species. Section 7 of the ESA requires each federal agency, in consultation with the Fish and Wildlife Service ("FWS"), to insure that any proposed action is not likely to jeopardize the continued existence of a threatened or endangered species, or result in the destruction or adverse modification of its critical habitat. 16 U.S.C. § 1536(a)(2). To facilitate compliance with Section 7, the agency must first inquire with FWS to determine whether any listed or proposed species may be present in the area of the proposed action. *Id.* § 1536(c)(1). When a listed or proposed species may be present in the action area, the agency must prepare a "biological assessment" to determine whether the species or their critical habitat may be affected by the action. *Id.* If the agency determines that the proposed action may affect any listed species or critical habitat, it must engage in formal consultation with FWS. 50 C.F.R. § 402.14.

During consultation, FWS must review all relevant information, evaluate the current status of the species or critical habitat, and evaluate the effects and cumulative effects of the proposed action on the listed species and their critical habitat. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(g)(1)–(3). For the purposes of the ESA, "[e]ffects of the action" refers to the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline." 50 C.F.R. § 402.02. Cumulative effects "are those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation." *Id.* Throughout its analysis, the consulting agency must utilize the "best scientific and commercial data available." 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(d). By failing to consult before completing work on the Bog Creek Road, the Agencies have violated the ESA's consultation requirements.

Section 9 requires that agencies insure that the proposed action does not result in the "take" of any listed species. 16 U.S.C. § 1538(a)(1)(B). "Taking" under the ESA "means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct." *Id.* § 1532(19). The "take" prohibited by Section 9 need not be the result of purposeful action. *Nat'l Wildlife Fed. v. Burlington Northern Railroad*, 23 F.3d 1508, 1509 (9th Cir. 1994) (trains accidentally hitting and thereby taking grizzly bears constitutes an ESA violation). It is highly likely that CBP's road work harmed and harassed listed species, including grizzly bears, Woodland caribou, Canada lynx, and bull trout.

CBP's road work violates both Section 7 and Section 9 of the ESA.

C. The Agencies Must Reclaim Bog Creek Road

In order to avoid litigation on CBP's illegal road work, we urge the Agencies to reclaim the work done on Bog Creek Road and return the road to its pre-project condition. This may include the placing of boulders, seeding, and/or shrub planting to prevent motorized equipment from using the old existing route. The Agencies must provide a written agreement to the undersigned organizations of its intent to reclaim the road. Furthermore, the Agencies must agree in writing to do no more repair work, including but not limited to vegetation clearing, on the Bog Creek Road or the Blue Joe Creek Road until a NEPA analysis and ESA consultation is complete. If no action is taken, the undersigned organizations may initiate a lawsuit to seek judicial remedies.

II. The Agencies Fail to Ensure Compliance with the National Forest Management Act

The Agencies must comply with National Forest Management Act ("NFMA") and its implementing regulations. NFMA requires the Forest Service to ensure that site-specific management projects are consistent with the applicable forest plan. 16 U.S.C. § 1604(i). Thus, the Agencies must ensure that all aspects of the proposed action comply with the Idaho Panhandle National Forests Land Management Plan.⁹ The following examples demonstrate how the Agencies fails to make that assurance for this proposal.

A. None of the Action Alternatives Would Meet the Access Amendment Standards

Specifically, the Service must ensure the project complies with all forestwide standards and guidelines, including the Grizzly Bear Access Amendment.

The Access Amendment adopted the following standards for the Blue-Grass BMU:

1. Open motorized route density (OMRD) of greater than 1 mile per square mile on no more than 33 percent of the BMU;
2. Total motorized route density (TMRD) of greater than 2 miles per square mile on no more than 26 percent of the BMU; and
3. Grizzly bear core area habitat comprising at least 55 percent of the BMU.¹⁰

According to Table 1.2.1 in the DEIS, in 2016 the OMRD in the Blue-Grass MMU was 30 percent, the TMRD was 29 percent, and the grizzly bear core area habitat was 48 percent.¹¹

⁹ USDA, Forest Service, Northern Region, Idaho Panhandle National Forests Land Management Plan (2015 Revision).

¹⁰ DEIS at 4.

However, the Agencies rely on lower numbers represented in Table 2.2.1, which shows OMRD at 14.87 percent, TMRD at 28.95 percent, and grizzly bear core habitat at 48.25 percent.¹² While the difference in the tables is not entirely clear, the DEIS asserts that Table 2.2.1 “reflects route designations . . . , not monitoring results from prior years.”¹³ Moreover, the DEIS explains that OMRD is not static, but rather is modeled based on the open motorized route density for a specific year and changes from year to year.¹⁴ Over the past ten years, OMRD in the Blue-Grass BMU has ranged from a low of 22.76 percent to a high of 34.65 percent, with the high obviously being above that permitted under the Access Amendment standard.¹⁵ This is largely because “[s]ometimes motorized administrative use exceeds the trip limit restrictions for individual road segments.”¹⁶

In any event, the Agencies cannot ignore the monitoring results from 2016, which is a true reflection of what is happening on the ground. Furthermore, the Agencies fail to explain the drastic difference between the 2016 monitoring results and the current designations. The large difference between the 2016 monitoring results and route designations, however, implies that either the public is unaware of or is ignoring closure designations, or that closure designations are insufficiently marked and not being enforced. Under either scenario, the Agencies must adequately explain the difference between the 2016 monitoring results and the current designations and explain why it is appropriate to ignore the 2016 monitoring results while relying instead on the current designations.

Because what is happening on the ground—as opposed to designations on paper—is what impacts wildlife and wildlife habitat, we believe the Agencies should be using the 2016 monitoring results as the appropriate baseline to assess the impacts of the proposed alternatives in the DEIS. Failure to use an appropriate baseline constitutes a NEPA violation. Furthermore, if the Agencies use the 2016 monitoring results as the appropriate baseline, none of the action alternatives would meet the Access Amendment standards, and thus fail to meet the purpose and need of the project. We therefore recommend that the Agencies propose new action alternatives that would meet the Access Amendment standards using the 2016 monitoring results as the appropriate baseline to assess impacts to wildlife and wildlife habitat in the Blue-Grass BMU.

B. Failure to Demonstrate Compliance with the Grizzly Core Habitat Buffer

¹¹ Id. at 5, Table 1.2.1.

¹² Id. at 16, Table 2.2.1.

¹³ Id.

¹⁴ Id. at 73.

¹⁵ Id. at 74.

¹⁶ Id. at 74.

Under the action alternatives, the DEIS notes the Agencies will monitor the use of Bog Creek Road for potential high use after repair. If an average of more than 20 parties per week use the trail, it would be considered a high use trail and a buffer would be removed from grizzly bear core area habitat.¹⁷ High-use trails have the potential to disturb or displace bears, and are buffered in the same fashion as drivable roads.¹⁸ The buffered area surrounding high-use trails is removed from core area habitat.¹⁹ The Agencies fail to explain how it would still meet the core area habitat requirements of the Access Amendment standards under the action alternatives when this happens, because presumably a buffer will be removed.

III. The Agencies Failed to Take a Hard Look at Impacts to Wildlife

A. Grizzly Bears

Grizzly bears in the Selkirk ecosystem are listed as a threatened species under the Endangered Species Act, and the Fish and Wildlife Service has found that reclassification to an endangered species is warranted but precluded by work on higher-priority species.²⁰ The most recent population estimate for the Selkirk Recovery Zone is 83 bears, under the minimum population goal of 90 set forth in the Grizzly Bear Recovery Plan.²¹ This population estimate includes just 25 bears residing in the U.S.²² However, this population estimate is over five years old and must be updated with more recent data.²³ Because these grizzly bears have the lowest genetic diversity of any grizzly bears in the lower 48 states, it is of primary importance to protect connectivity corridors and linkage zones so that these bears can breed with bears outside of the confines of the Selkirk Recovery Zone.²⁴

For these reasons, in addition to adopting the Access Amendment standards discussed above, the Idaho Panhandle National Forest Plan aims to ensure that “[a]ll grizzly BMUs have low levels of disturbance to facilitate denning activities, spring use, limit displacement, and reduce human/bear conflicts and potential bear mortality.”²⁵ The Forest Plan favors that “[r]ecover of the grizzly bear is promoted by motorized access management within the IPNF portion of the Cabinet-Yaak and Selkirk recovery zones,” and asserts that the agency shall apply the Interagency Grizzly Bear Guidelines to management activities.²⁶

¹⁷ See, e.g., *id.* at 42, 115.

¹⁸ *Id.* at 77.

¹⁹ *Id.*

²⁰ *Id.* at 73.

²¹ *Id.* at 75.

²² *Id.*

²³ *Id.*

²⁴ See *id.*

²⁵ United States Department of Agriculture, United States Forest Service, Land Management Plan: Idaho Panhandle National Forests (2015 Revision) (hereinafter, “Forest Plan”), at 29.

²⁶ *Id.* at 29, 32.

The Interagency Grizzly Bear Guidelines call on the Forest Service to “emphasize actions which contribute toward conservation and recovery of the bear within areas identified in the Grizzly Bear Recovery Plan” and “to maintain and enhance habitat and to minimize potential for grizzly-human conflicts.”²⁷ The agency will manage these lands for multiple land use benefits, but only “to the extent these land uses are compatible with the goal of grizzly recovery.”²⁸ “Land uses which cannot be made compatible with the goal of grizzly recovery, and are under FS control, will be redirected or discontinued.”²⁹ The Blue-Grass BMU has been designated Management Situation 1, meaning that managing for grizzly bears shall receive “the highest management priority,” and land management decisions must favor the needs of grizzly bears over other competing land use values.³⁰ Other land uses will only be permitted if they can be made compatible with grizzly needs.³¹

None of the action alternatives in the DEIS are compatible with grizzly bear needs, as building and repairing the Bog Creek Road and increasing access and motorized use on the Blue Joe Creek Road will cause disturbance, avoidance, and is likely to displace bears currently using the area. Current data shows extensive use by grizzly bears of the Blue-Grass BMU, including breeding bears and denning habitat.³² While the Agencies admit that all of the action alternatives would cause both short-term and long-term detrimental impacts to grizzly bears, the Agencies fail to follow the mandates of the Forest Plan and the Interagency Grizzly Bear Guidelines to prioritize grizzly recovery over other land use values in the Blue-Grass BMU.³³ The Agencies cannot justify its actions by creating and Purpose and Need statement that prioritizes other land use values, including the stated goal to improve border access.³⁴

In addition, the project area contains lands in the Priest Lake Geographic Area and the Lower Kootenai Geographic Area, both of which have Forest Plan desired conditions to maintain low levels of human disturbance in grizzly bear habitat and to retain linkage corridors for grizzly bears and other wildlife.³⁵ The Project Area also includes Management Areas 1b (Recommended Wilderness) and 5 (Backcountry), both of which contain large remote areas with little human disturbance that should be retained and contribute habitat for species with large home ranges such as wide ranging carnivores (e.g., grizzly bears).³⁶ In other words, these large expanses of habitat should remain remote with little human disturbance to provide secure habitat and connectivity corridors for grizzly bears.³⁷

²⁷ Interagency Grizzly Bear Committee, Interagency Grizzly Bear Guidelines (1986), at 2.

²⁸ *Id.* at 2.

²⁹ *Id.* at 2.

³⁰ *Id.* at 3; DEIS at 75.

³¹ Interagency Grizzly Bear Committee, Interagency Grizzly Bear Guidelines (1986), at 3.

³² DEIS at 75-76.

³³ See DEIS at 40-43, Table 2.4.2 (comparing impacts to grizzly bears by alternative).

³⁴ *Id.* at 6.

³⁵ *Id.* at 91-92, Table 3.2.6; Forest Plan at 84-85, 92-93.

³⁶ DEIS at 91, Table 3.2.6; Forest Plan at 46-47, 69.

³⁷ Forest Plan at 46-47, 69.

As the DEIS admits, however, the action alternatives have the potential to disrupt grizzly bear movement through linkage corridors, and therefore do not meet the desired conditions as described in the Forest Plan.³⁸ Specifically, the Blue-Grass BMU is an important connectivity corridor for grizzly bears.³⁹ But the repair, motorized closure activities, and increased motorized use of Bog Creek and Blue Joe Creek roads will significantly impact bear movements throughout the BMU, which bears use as a movement corridor between other BMUs in the Selkirk and Recovery Zone, including bears that move in a north-south direction to reach the Canadian portion of the Selkirk Recovery Zone.⁴⁰ The Agencies acknowledge that the proposed activities will “reduc[e] the permeability of the movement corridor as a whole” and may decrease the genetic flow between the U.S. and Canadian bear populations.⁴¹ This avoidance behavior could continue indefinitely given the long-term administrative motorized use proposed.⁴²

By reconstructing a currently overgrown and impassible road and opening another seasonally restricted road up to unrestricted access, the Agencies fail to comply with the Desired Conditions in the Forest Plan laid out for these geographic and management areas. The action alternatives will simply add more disturbance to an area considered necessary habitat for grizzly bear recovery, and thus cannot be aligned with the goals of the Forest Plan.

Furthermore, the Agencies rely on research from the 1980s in attempts to predict when bears will be using higher and lower elevations in the BMU, and to predicate its assertions that it will base its work season around when grizzly bears may be using the areas surrounding the roads under construction.⁴³ This research, however, is woefully outdated and does not present an accurate account of what grizzly bears are doing on the ground now. For example, this research does not account for climate change, which may be causing bears to emerge from their dens and use low elevations lands later in the season than they did in the 1980s. NEPA requires that agencies use “high quality” information and “accurate scientific analysis,” and thus we request that the Agencies update this section of the EIS with timely and up-to-date science and data.

B. Woodland Caribou

In 1983, the southern Selkirk Mountain population of woodland caribou was emergency listed as endangered under the Endangered Species Act, and the caribou was finally listed as endangered on February 29, 1984.⁴⁴ These caribou are also listed as a state endangered species and an Idaho

³⁸ DEIS at 98.

³⁹ *Id.* at 99.

⁴⁰ *Id.* at 99, 115.

⁴¹ *Id.* at 99.

⁴² *Id.*

⁴³ *Id.* at 76.

⁴⁴ *Id.* at 78.

Tier 1 Species of Greatest Conservation Need.⁴⁵ The 1985 Recovery Plan set an intermediate population target of 100 to 109 caribou, and the 1994 Recovery Plan set a goal of maintaining two herds – one in British Columbia and Idaho – with the stated goal to establish a herd in Washington as well.⁴⁶ None of these goals have been achieved, and in 2016, only 12 caribou were detected during monitoring efforts.⁴⁷ Unfortunately, this Woodland caribou population has been spiraling toward extinction without pause. As of the spring 2018 census there were only three females in the Southern Selkirk Herd, none of which were pregnant. There are four remaining caribou in the S. Purcell herd (three bulls and one cow). According to the Fish and Wildlife Service, past and ongoing habitat destruction and fragmentation and motorized road access to caribou habitat are two of the six greatest threats to this struggling population.⁴⁸

Although it is critically important to protect caribou habitat in the Selkirks, the project coincides with three Caribou Management Units (“CMUs”): Upper Priest, Grass, and Cow.⁴⁹ The caribou analysis area consists of 67,960 acres, 93 percent of which is considered caribou habitat.⁵⁰ Caribou have been documented both historically and recently in all three CMUs included in the project’s caribou analysis area, including along the Bog Creek Road corridor.⁵¹

The Agencies also acknowledge that limited genetic exchange between this population and adjacent populations threatens the long-term population viability of the Woodland caribou.⁵² The action alternatives have the potential to further decrease gene flow for caribou in the project area.⁵³

According to the DEIS, under all action alternatives, road maintenance and decommissioning may last up to three seasons.⁵⁴ With just a dozen caribou documented as remaining in this population, however, it is unknown whether this population—so close to the brink of extinction—could survive three full seasons of road work. Remoteness from human presence, low road densities, and limited motorized access are all important factors impacting caribou habitat selection and survival.⁵⁵ In addition to causing displacement as caribou avoid human presence, roads may also increase predation upon caribou by wolves and other predators.⁵⁶ Notably, law enforcement patrol, because exceptions to winter motorized closures and road use are often made, is listed as a specific factor that has impacted and may continue to impact the

⁴⁵ Id.

⁴⁶ Id. at 79.

⁴⁷ Id.

⁴⁸ Id. at 79-80.

⁴⁹ Id. at 80.

⁵⁰ Id. at 81.

⁵¹ Id.

⁵² Id. at 80.

⁵³ Id. at 97.

⁵⁴ See, e.g., id. at 19.

⁵⁵ Id. at 82.

⁵⁶ Id.

destruction and fragmentation of caribou habitat.⁵⁷ Roads may also impact modeled travel corridors necessary to achieve the goals of the Recovery Plan.⁵⁸

The action alternatives also do not comply with the Forest Plan guideline to avoid or minimize disturbance in occupied caribou summer habitat from July 8 to October 16.⁵⁹ Rather than follow this guidelines, the Agencies propose road construction and repair work from July 16 to November 15 for up to three years in known occupied caribou habitat, and would increase road use in the same area in perpetuity.⁶⁰

Due to the small size of the Woodland caribou population in the Selkirks and the negative impacts that roads can have upon caribou and their habitat, we believe that this project will jeopardize the recovery and continued survival of this Woodland caribou population. We believe that the Agencies must take a closer look at the impacts to Woodland caribou and the likelihood that this project may accelerate the extinction of this small population.

C. Bull Trout

Bull trout are a cold-water fish of relatively pristine streams and lakes. They have specific habitat requirements: cold, clean, complex and connected habitat. Primary threats to bull trout include habitat degradation and fragmentation, blockage of migratory corridors, poor water quality, past fisheries management, and the introduction of non-native species such as brown, lake, and brook trout. Effects resulting from climate change also threaten bull trout, because a warming climate is expected to shrink cool spawning and rearing areas. Bull trout occur over a large area, but their distribution and abundance has declined and scientists have documented several local extinctions. Remaining populations tend to be small and isolated from each other, making the species more susceptible to local extinctions.

Bull trout in the project area are listed as threatened under the Endangered Species Act and are considered to be in decline across their range.⁶¹ Designated bull trout critical habitat exists in the project area, downstream from numerous tributaries that Bog Creek Road crosses.⁶² The Agencies recognize that historic road construction, timber harvest, and mining that have occurred in the analysis area have likely reduced the habitat quality and connectivity of streams occupied by bull trout and streams designated as bull trout critical habitat.⁶³ Road construction and increased use—as proposed under all action alternatives—threatens to increase sedimentation into streams occupied by bull trout and mapped as designated critical habitat, including Upper

⁵⁷ *Id.*

⁵⁸ *Id.* at 82-83.

⁵⁹ *Id.* at 91.

⁶⁰ *See, e.g., id.* at 19.

⁶¹ *Id.* at 88-89.

⁶² *Id.* at 72 (map of bull trout critical habitat in project area).

⁶³ *Id.* at 89.

Priest River, Malcom Creek, and Lime Creek.⁶⁴ Indeed, road construction is one of the greatest factors affecting bull trout survival.⁶⁵ Sedimentation can reduce habitat complexity and pool depth, reduce egg survival and emergence, kill young bull trout, and can impact insect larvae preyed upon by bull trout.⁶⁶

Roads often contribute to degraded baseline conditions in watersheds containing bull trout. Roads are a primary source of sediment impacts to developed watersheds. Accumulation of fine sediment is detrimental to bull trout habitat. Studies have found a pattern of decreasing strong populations of bull trout with increasing road density. Sediment delivered to streams is greatest in riparian areas where roads cross the streams. Fords and approaches to the crossings deliver sediment directly to streams.

Culverts can produce a large amount of sediment if the culvert plugs and fails. Travel management decisions affecting roads and trails are most likely to effect substrate embeddedness⁶⁷ and stream bank condition.⁶⁸ Plus roads and trails paralleling streams can interfere with large wood reaching the stream and cause increased erosion and decreased stream bank condition.

The Agencies note that repair and maintenance of Bog Creek Road would include installation of six new culverts and replacement of six out of 67 existing corrugated metal pipe culverts located along the length of the roadway.⁶⁹ The Agencies further assert that a culvert failure and resulting road washout made the road completely impassable at Spread Creek.⁷⁰ The fact that this washout exists demonstrates the lack of maintenance by the Agencies on existing culverts, despite the known and demonstrated risk of culvert washouts. Proposing *new* culverts ignores the Agencies' limited capacity to maintain even the existing culverts, much less ensure protection of bull trout and water quality in bull trout critical habitat downstream from culverts. This, despite the Agencies' historic lack of maintenance and resulting culvert washouts. It fails to disclose that culvert washouts are just as likely under the action alternatives (given that the number of culverts will actually *increase* and the agency's maintenance funding continues to decrease) as the no action alternative.⁷¹

For the action alternatives, the Agencies' state sedimentation from culvert replacement could be measurable to 800 feet downstream, while sedimentation from culvert removals could be

⁶⁴ See *id.* at 72, Figure 3.2.5; *id.* at 88, Table 3.2.5.

⁶⁵ *Id.* at 89.

⁶⁶ *Id.* at 89, 96.

⁶⁷ Which can be measured as change in total acreage open to motorized use, based on the assumption that embeddedness is related to the total area susceptible to erosion.

⁶⁸ Which can be measured as an inverse of stream crossings.

⁶⁹ DEIS at xiii.

⁷⁰ *Id.*

⁷¹ *Id.* at 47 (stating that “[t]here would be a lower long-term potential, compared with the No-Action Alternative, for culvert failure . . . following culvert replacement or removal,” while ignoring the continuing potential for culvert failure from the 67 remaining culverts on Bog Creek Road that will be subject to increased use by opening the road).

measurable 3,000 feet downstream.⁷² The DEIS also states the effects from culvert replacement or removal would be temporary (less than 24 hours).⁷³ And it states that bull trout are located over 4,000 feet downstream from the proposed in-stream work to remove or replace culverts.⁷⁴

The Agencies improperly skew the impacts analysis in favor of the action alternatives by conveniently ignoring impacts that will result under all of the alternatives. For example, the DEIS makes no mention of the ongoing risk of culvert failure from the 67 culverts remaining on Bog Creek Road even after maintenance under each of the action alternatives. In contrast, the agency states that under the No Action alternative “culvert failure or blowout could catastrophically release sediment downstream” with detrimental impacts for the following 5-10 years to downstream bull trout and designated bull trout critical habitat (Upper Priest River, Malcom Creek, and Lime Creek).⁷⁵ The Agencies’ analysis arbitrarily and capriciously omits the impact of keeping 67 culverts on Bog Creek Road under the action alternatives. These culverts are subject to catastrophic failure, as explained in the No Action alternative analysis.

D. Canada Lynx

The Agencies must thoroughly disclose, analyze, and vet impacts to Canada lynx and its habitat before any final decision is made on this project. They also must ensure that the project complies with all aspects of the Northern Rockies Lynx Amendment (NRLA). Lynx move between boreal habitats in Canada and the contiguous United States. Immigration of lynx from Canada plays a vital role in sustaining lynx in the contiguous United States.⁷⁶ The Canada Lynx Conservation Assessment and Strategy (LCAS) initially identified 17 risk factors, including roads, thought to have the potential to affect lynx habitat suitability, productivity, mortality, and movements.⁷⁷

Lynx in the contiguous United States may exist as several smaller, effectively isolated populations. Metapopulation stability depends on habitat quality and successful dispersal between isolated habitat patches. The likelihood of subpopulation persistence declines with increasing fragmentation and isolation. Maintaining habitats to provide for dispersal movements and interchange among individuals and subpopulations may be the most important provision for maintenance of population viability in the LCAS.⁷⁸

⁷² Id.

⁷³ Id.

⁷⁴ Id.

⁷⁵ Id.

⁷⁶ McKelvey et al., Theoretical insights into the population viability of lynx, pages 21-38 in L.F. Ruggiero et al., Ecology and conservation of lynx in the contiguous United States, University Press of Colorado, Boulder (2000).

⁷⁷ U.S. Fish and Wildlife Service, Species Status Assessment for the Canada Lynx Contiguous United States Distinct Population Segment (Oct. 2017) (hereinafter, “Species Status Assessment”), page 54.

⁷⁸ Interagency Lynx Biology Team (ILBT), Canada lynx conservation assessment and strategy (3d ed. 2013), Forest Service Publication R1-13-19. The LCAS continues to fulfill important roles in promoting conservation of the species on federal lands like the Payette National Forest. Id. at 4.

Roads associated with forest management fragment habitat and can increase access by competing predators and humans, both potentially affecting lynx habitats and populations.⁷⁹ In Alberta, Canada, high road densities, human activity, and associated developments appeared to reduce the habitat quality based on decreased occupancy by lynx.⁸⁰ In another study, lynx denned farther from all roads compared to random expectation.⁸¹ Roads can result in direct mortality of lynx through collision, and also provide human access into lynx habitat where incidental trapping or illegal shooting can occur.⁸² In Maine, 22 out of 54 lynx mortalities occurred on dirt logging roads with low traffic volumes and lower speed limits.⁸³

The Agencies mention the action alternatives will remove vegetation that may provide snowshoe hare habitat (which is prey for lynx).⁸⁴ In a study in Maine, lynx killed fewer hares near logging roads, likely because hare density was lower there than in adjacent un-roaded habitats or possibly because of increased potential for interactions with generalist competitors like coyotes.⁸⁵ At bottom, roads of all sizes may have direct and indirect effects to lynx, including habitat loss and fragmentation, vehicle collisions, increasing human access, increased incidental trapping and illegal shooting, and reduced prey. Impacts to Canada lynx from the snowmobile use authorized for CBP enforcement is addressed below.

E. Wolverines

Wolverines exist in the project area and are currently proposed for listing as threatened under the ESA. The species was originally proposed for listing in 2013 due to risk of eventual habitat and range loss due to climate warming, with secondary threats from trapping and wolverine harvest, human development, transportation corridors, and loss of genetic stochasticity due to isolation between snowy habitats caused by climate change.⁸⁶ The U.S. Fish and Wildlife Service (FWS) withdrew the 2013 proposed listing rule in 2014, but in 2016 a Federal district court ordered FWS to reconsider protections for wolverines under the ESA, moving the wolverine back to the proposed list. The wolverine is also identified as a Sensitive Species by the Forest Service in Region 1, and therefore is subject to the laws and regulations regarding Sensitive Species.

Wolverines appear to avoid transportation corridors in their daily movements.⁸⁷ Most roads in wolverine habitat are low-traffic volume dirt or gravel roads. Wolverines tend to locate natal

⁷⁹ DEIS at 85.

⁸⁰ Id. at 100.

⁸¹ Id. at 101.

⁸² Id.

⁸³ Id.

⁸⁴ Id. at 106.

⁸⁵ Species Status Assessment at 101.

⁸⁶ 78 Fed. Reg. 7864 (Feb. 4, 2013).

⁸⁷ Id. at 7879.

dens a distance from public (greater than 4.6 miles) and private (greater than 1.9 miles) roads.⁸⁸ Impacts to wolverine from the snowmobile use authorized for CBP enforcement is addressed below. The Agencies fail to fully assess these direct, indirect, and cumulative impacts to wolverine from its proposal to open and authorize use on Bog Creek Road and Blue Joe Creek Road.

F. Impacts from Forest Roads

The best available science shows that roads cause significant adverse impacts to National Forest resources.⁸⁹ A 2014 literature review from The Wilderness Society surveys the extensive and best available scientific literature—including the Forest Service’s General Technical Report synthesizing the scientific information on forest roads (Gucinski 2001)—on a wide range of road-related impacts to ecosystem processes and integrity on National Forest lands.⁹⁰ Erosion, compaction, and other alterations in forest geomorphology and hydrology associated with roads seriously impair water quality and aquatic species viability. Roads disturb and fragment wildlife habitat, altering species distribution, interfering with critical life functions such as feeding, breeding, and nesting, and resulting in loss of biodiversity. Roads facilitate increased human intrusion into sensitive areas, resulting in poaching of rare plants and animals, human-ignited wildfires, introduction of exotic species, and damage to archaeological resources.

Roads contribute to the spread of invasive species. Roads themselves, regardless of whether they are open or closed to public access, split apart the forest landscape, creating more buffers where invasive species are likely to grow.⁹¹ The Agencies should include in the EIS an assessment of how the proposed roads (even absent vehicles and regardless of maintenance level) provide a vector for the spread of invasive species by fragmenting the landscape and creating buffers that are less resistant and resilient to stressors like invasive species.

Science shows that roads and trails play a role in affecting wildfire occurrence. See Attachment A at 9 (noting human-ignited wildfires account for more than 90% of fires on national lands and are almost five times more likely in areas with roads). Closed roads remain on the landscape and thus continue to allow for human-caused wildfires. What’s more, roads that remain on the landscape can affect where and how forests burn.⁹² In taking a hard look at this proposal, the Agencies must consider how opening Bog Creek Road and Blue Joe Creek Road to year-round access is likely to increase the risk of wildfire occurrence in this area.

⁸⁸ Id. at 7878.

⁸⁹ See, e.g., 66 Fed. Reg. at 3208 (“Scientific evidence compiled to date [2001] suggests that roads are a significant source of erosion and sedimentation and are, in part, responsible for a decline in the quality of fish and wildlife habitat.”).

⁹⁰ See The Wilderness Society, *Transportation Infrastructure and Access on National Forests and Grasslands: A Literature Review* (May 2014) (Attachment A).

⁹¹ See Attachment A at 11.

⁹² Id.

Finally, a robust analysis under NEPA of the forest roads proposed here is especially critical in the context of climate change. Climate change is a major challenge for natural resource managers because of the magnitude of potential effects and the related uncertainty of those effects.

Climate change intensifies the impacts associated with roads. For example, as the warming climate alters species distribution and forces wildlife migration, landscape connectivity becomes even more critical to species survival and ecosystem resilience.⁹³ Climate change is also expected to lead to more extreme weather events, resulting in increased flood severity, more frequent landslides, altered hydrographs, and changes in erosion and sedimentation rates and delivery processes.⁹⁴ Many National Forest roads are poorly located and designed to be temporarily on the landscape, making them particularly vulnerable to these climate alterations.⁹⁵ Even those designed for storms and water flows typical of past decades may fail under future weather scenarios, further exacerbating adverse ecological impacts, public safety concerns, and maintenance needs.⁹⁶ At bottom, climate change predictions affect all aspects of road management, including planning and prioritization, operations and maintenance, and design.⁹⁷

The Forest Service has a substantive duty under its own Forest Service Manual to establish resilient ecosystems in the face of climate change.⁹⁸ More broadly, the Forest Service has a mission to sustain the health, diversity, and productivity of the Nation's forests and grasslands to meet the needs of present and future generations. The agency's own climate change science identified above demonstrates how climate change places ecosystems on our national forests at risk. Thus to fulfill this mission, the Agencies must address the risks of climate change when managing activities involving roadwork on our national forests.⁹⁹

Here, the Agencies improperly dismiss climate change impacts in the context of greenhouse gas

⁹³ Attachment A at 9-14.

⁹⁴ See, e.g., Halofsky, J.E. et al. eds., USDA, Forest Service, Pacific Northwest Research Station, *Adapting to Climate Change at Olympic National Forest and Olympic National Park*, PNW-GTR-844 (2011), pages 21-27 (Attachment B).

⁹⁵ See, e.g., *id.* at 36-38.

⁹⁶ See, e.g., Strauch, R.L. et al., *Adapting transportation to climate change on federal lands in Washington State*, Climate Change 130(2), 185-199 (2015) (noting the biggest impacts to roads and trails are expected from temperature-induced changes in hydrologic regimes that enhance autumn flooding and reduce spring snowpack).

⁹⁷ Attachment B at 35.

⁹⁸ See, e.g., FSM 2020.2(2) (directing forests to “[r]estore and maintain resilient ecosystems that will have greater capacity to withstand stressors and recover from disturbances, especially those under changing and uncertain environmental conditions and extreme weather events”); FSM 2020.3(4) (“[E]cological restoration should be integrated into resource management programs and projects . . . Primary elements of an integrated approach are identification and elimination or reduction of stressors that degrade or impair ecological integrity.”).

⁹⁹ USDA, Forest Service, *National Roadmap for Responding to Climate Change* at 26 (2011), available at <http://www.fs.fed.us/climatechange/pdf/Roadmapfinal.pdf>, page 4 (outlining the agency's plans to respond to climate change through assessing risks and vulnerabilities, engaging to seek solutions, and managing for resilience).

emissions, stating project emissions would be negligible.¹⁰⁰ The only place the agencies' analysis comes close to assess the impacts of climate change and forest roads is in its discussion of cumulative impacts to wildlife.¹⁰¹ But even there, the analysis fails to consider how climate change may result in changing weather patterns, which is likely to directly and indirectly affect the forest roads proposed herein as well as result in cumulative impacts when combined with forest roads on the landscape and wildlife.

The Agencies must analyze in detail the impact of climate change on forest roads and forest resources. The analysis should start with a vulnerability assessment, to determine the project area's exposure and sensitive to climate change, as well as its adaptive capacity.¹⁰² For example, the Agencies should consider the risk of increased disturbance due to climate change when analyzing this proposed project. It should include existing and reasonably foreseeable climate change impacts as part of the affected environment, assess them as part of the Agencies' hard look at impacts, and integrate them into each of the alternatives, including the no action alternative. The Agencies should also consider the cumulative impacts likely to result from the proposed project, proposed road activities, and climate change.¹⁰³ In planning for climate change impacts and the proposed road activities, the Agencies should consider: (1) protecting large, intact, natural landscapes and ecological processes; (2) identifying and protecting climate refugia that will provide for climate adaptation; and (3) maintaining and establishing ecological connectivity.¹⁰⁴

G. Impacts from Snowmobile Use

The DEIS notes that winter restrictions do not apply to law enforcement activities and thus CBP may access the developed roads via snowmobile during the winter.¹⁰⁵ The Agencies must consider and disclose impacts from the proposal to allow snowmobile use along Bog Creek Road, including impacts to imperiled wildlife.¹⁰⁶

Grizzly Bears

¹⁰⁰ DEIS at 12-13.

¹⁰¹ *Id.* at 171.

¹⁰² Attachment B at 36 ("potential climate change effects underscore the need to increase activity and be proactive in priority areas to avoid impacts associated with infrastructure failure.").

¹⁰³ *Id.* ("Managers will likely need to evaluate the density, location, design, and maintenance intensity of roads and related structures in the context of climate change to avoid escalating road maintenance costs associated with [climate change] impacts").

¹⁰⁴ See Schmitz, O.J. and A.M. Trainor, *Adaptation Approaches for Conserving Ecosystem Services and Biodiversity in Dynamic Landscapes Caused by Climate Change*, USDA Forest Service RMRS-P-71 (2014), pages 301-303.

¹⁰⁵ DEIS at 113.

¹⁰⁶ A. Switalski, Snowmobile Best Management Practices for Forest Service Travel Planning: A Comprehensive Literature Review and Recommendations for Management – *Wildlife*, 12 Journal of Conservation Planning 13 (2016) (Attachment C).

Effects of snowmobiles on grizzly bears occur primarily when bears are entering or leaving their dens. Possible effects include den abandonment, loss of young, increased energetic costs while bears are in dens or displaced away from suitable habitat if outside dens, learned displacement from suitable habitat resulting from exposure to disturbance, and death. Grizzly bear denning habitat often overlaps with winter recreation areas, making them susceptible to disturbance, thereby increasing energy expenditures and the potential for den abandonment.¹⁰⁷ Grizzly bears typically den in relatively high elevation areas with more stable snow conditions and steep slopes.¹⁰⁸ Direct mortality is possible if an avalanche is triggered on a slope where bears are hibernating.¹⁰⁹ In general, grizzlies avoid roads¹¹⁰ and select den sites one to two kilometers from human activity.¹¹¹ Snowmobiles can easily access these remote sites and therefore pose a potential for disturbance. A comprehensive review found human disturbance within one kilometer of a den site has a significant risk of causing abandonment, especially early in the denning season.¹¹²

Snowmobiles may have direct harmful effects to emergent bears, mainly females and cubs. Because females with cubs have high energetic needs and cubs have limited mobility for several weeks after leaving the den, they remain in the den site area for several weeks after emergence from dens. Disturbance levels that cause a female to prematurely leave the den in spring or move from the den area could impair the fitness of the female and safety of the cubs.¹¹³ The mean week of den emergence ranged from the third week in March to the fourth week in May.¹¹⁴ It is important to provide secure habitat—areas free of motorized access—so bears are able to fully use available resources.¹¹⁵

Woodland Caribou

It is well established that undisturbed “winter range” is essential for ungulates survival.¹¹⁶ Snowmobiles cause both a physiological and behavioral response on ungulate species, resulting

¹⁰⁷ J.D.C. Linnell *et al.*, How vulnerable are denning bears to disturbance? 28 Wildlife Society Bulletin 2 (2000).

¹⁰⁸ *Id.*

¹⁰⁹ G.V. Hilderbrand *et al.*, A Denning Brown Bear, *Ursus arctos*, Sow and Two Cubs Killed in an Avalanche on the Kenai Peninsula, Alaska, 114 Canadian Field-Naturalist 3 (2000).

¹¹⁰ R.D. Mace *et al.*, Relationships Among Grizzly Bears, Roads and Habitat in the Swan Mountains, MT, 33 Journal of Applied Ecology (1996).

¹¹¹ Linnell (2000).

¹¹² *Id.*

¹¹³ USDI, Fish and Wildlife Service, Endangered Species Act Section 7 Consultation Supplement to the Biological Opinion (2010) on the Effects of the 2009 Revision of the Beaverhead-Deerlodge National Forest Land and Resource Management Plan on Grizzly Bears (2013).

¹¹⁴ M. Haroldson and F.T. van Manen, Estimating Number of Females with Cubs, in *Yellowstone grizzly bear investigation: annual report of the Interagency Grizzly Bear Study Team* (F.T. van Manen *et al.*, eds. 2014).

¹¹⁵ USDA Forest Service, Forest Plan Amendment for Grizzly Bear Habitat Conservation for the Greater Yellowstone Area National Forests (2006), page 7.

¹¹⁶ Attachment C at 17.

in disturbance and displacement.¹¹⁷ Limiting disturbance – including limiting the duration and spatial footprint – to woodland caribou, especially in winter range, is a key management strategy for protecting the species.

Canada Lynx

For Canada lynx, the Agencies state that snowmobile trails allowed by the court-ordered closure within the Blue-Grass BMU would not change under the No Action alternative, but it fails to consider the impacts of newly authorized snowmobile use (for CBP) on Canada lynx under each of the action alternatives.¹¹⁸ Snowmobiles may directly affect Canada lynx during winter months when the species is especially vulnerable by causing physiological responses like increased heart rate and elevated stress level.¹¹⁹ The noise from snowmobiles is likely detrimental to lynx, disturbing their ability to hunt and increasing stress. Studies on other large mammals that reside in lynx habitat indicate that snowmobiles elicit an even higher stress response than off road vehicles.¹²⁰ Snowmobiles may disturb den sites during a time when lynx are rearing young.¹²¹ Snowmobiles may also displace lynx and disrupt otherwise quiet winter habitat by facilitating human access into historically remote winter forest landscapes, increasing lynx interactions with humans, and increasing hunting, trapping, and poaching mortality.¹²² This in turn may result in direct collisions, death, habitat fragmentation, and potential population declines.¹²³

Snow compaction from snowmobiles is another threat to lynx. Snow compaction may suffocate or alter the subnivean movements of small mammals on which lynx prey.¹²⁴ Compacted snow trails may also allow coyotes to move into lynx habitat that coyotes previously used only seasonally. Lynx are well adapted to travel and hunt in the deep, powdery snow where snowshoe hares reside and benefit from a natural spatial segregation from other carnivores.¹²⁵ One study in Montana found limited use of snowmobile trails by coyotes.¹²⁶ But studies in Utah and Wyoming found extensive use of compacted snowmobile trails by coyotes, resulting in potential

¹¹⁷ Id.

¹¹⁸ DEIS at 44.

¹¹⁹ W.L. Gaines *et al.*, Assessing the cumulative effects of linear recreation routes on wildlife habitats on the Okanogan and Wenatchee National Forests (2003), Gen. Tech. Rep. PNW-GTR-586, *available at* <http://www.fs.fed.us/pnw/pubs/gtr586.pdf> (last accessed August 22, 2017), pages 5-6.

¹²⁰ S. Creel *et al.*, Snowmobile Activity and Glucocorticoid Stress Responses in Wolves and Elk, 16 Conservation Biology 809, 812 (2002).

¹²¹ J.J. Claar *et al.*, Carnivores, *in* Effects of recreation on Rocky Mountain wildlife: a review for Montana (G. Joslin and H. Youmans, eds., 1999).

¹²² Gaines (2003) at 11. *See also* 2008 Main Salmon BA at 7.

¹²³ Gaines (2003) at 11-12.

¹²⁴ W.D. Schmid, Snowmobile activity, subnivean microclimate and winter mortality of small mammals, 53 Bulletin of the Ecological Society of America, 37 (1972).

¹²⁵ K.D. Bunnell *et al.*, Potential impacts of coyotes and snowmobiles on lynx conservation in the intermountain west, 34 Wildlife Society Bulletin 828 (2006).

¹²⁶ J.A. Kolbe *et al.*, The effect of snowmobile trails on coyote movements within lynx home ranges, 71 Journal of Wildlife Management 1409 (2007).

competition with and displacement of lynx.¹²⁷ The differing results are likely due to different snow characteristics, predator communities, and snowmobile use at the various sites.¹²⁸ Under the LCAS, the Forest Service assesses the potential for snowmobile trails to provide routes for competitors such as coyotes, bobcats and cougars based on the density of groomed or commonly used snowmobile routes in LAUs.¹²⁹

Wolverine

Snowmobile use commonly overlaps with wolverine denning habitat.¹³⁰ Dispersed recreational activities like motorized winter recreation have the potential to negatively impact wolverine by disrupting natal denning areas.¹³¹ Wolverines have one of the lowest successful reproductive rates known to mammals, and this is hypothesized as linked to winter energy constraints. Female wolverines select and enter dens and give birth in February to mid-March¹³² and the overlap of winter recreation with this energetically taxing period is highly concerning. Any disturbance during this important winter period can negatively affect productivity and other vital rates.¹³³

Researchers have reported that female wolverines may be sensitive to human disturbance in the vicinity of natal and maternal dens, and disturbance from foot and snowmobile traffic has been purported to cause maternal females to abandon or move dens.¹³⁴ Preliminary findings from the ongoing study suggest wolverine exposed to higher levels of winter recreation in their home range may avoid recreated areas and move at higher rates in higher intensity recreation areas. In particular, denning female wolverines showed higher movement rate increases in response to higher intensity recreation areas, which causes higher expenditure of energy and reduced ability

¹²⁷ Bunnell (2006); E. Gese *et al.*, The Influence of Snowmobile Trails on Coyote Movements During Winter in High-Elevation Landscapes, 8 Plos One 1 (2013).

¹²⁸ J.L.B. Dowd *et al.*, Winter Space Use of Coyotes in High-Elevation Environments: Behavioral Adaptations to Deep-Snow Landscapes, 32 Journal of Ethology 29 (2014).

¹²⁹ See LCAS (3d ed. 2013).

¹³⁰ A. Switalski, Snowmobile Best Management Practices for Forest Service Travel Planning: A Comprehensive Literature Review and Recommendations for Management – *Wildlife*, 12 Journal of Conservation Planning 13 (2016).

¹³¹ See, e.g., R.M. Inman *et al.*, Wolverine reproductive chronology, *In: Wildlife Conservation Society, Greater Yellowstone Wolverine Program, Cumulative Report* (2007a); J. Krebs *et al.*, Multiscale habitat use by wolverines in British Columbia, Canada, 71 Journal of Wildlife Management 2180 (2007); E.C. Lofroth and J. Krebs, The Abundance and Distribution of Wolverines in British Columbia, Canada, 71 Journal of Wildlife Management 2159 (2007); L.F. Ruggiero *et al.*, Wolverine conservation and management, 71 Journal of Wildlife Management 2145 (2007).

¹³² A.J. Magoun and J.P. Copeland, Characteristics of wolverine reproductive den sites, 62 Journal of Wildlife Management 1313 (1998).

¹³³ R. May *et al.*, Impact of infrastructure on habitat selection of wolverines *Gulo gulo*, 12 Wildlife Biology 285 (2006); Krebs (2007).

¹³⁴ S. Myrberget, The breeding den of the wolverine, 21 Fauna 108 (1968); Magoun and Copeland (1998); R.M. Inman *et al.*, Wolverine reproductive rates and maternal habitat in Greater Yellowstone, *In: Wildlife Conservation Society, Greater Yellowstone Wolverine Program, Cumulative Report* (2007b).

to hunt for food.¹³⁵

These behavioral changes can negatively affect individuals' physiological stress levels and reproductive capacity in several ways, as evidenced in numerous studies on different species.¹³⁶ It may reduce the amount of time and thus ability of female wolverines to hunt or to utilize food caches. This would result in significant additive energetic effects, reducing foraging success for adult females already stressed by the demands of bearing and raising a litter.¹³⁷ In addition, this could reduce kit survival rates by increasing the potential for predation and exposure to cold temperatures. These results indicate that winter recreation may impact wolverines in as yet unknown ways.

As snowmobiling continues to grow in popularity and as snowpack continues to decline due to climate change, there is increasing concern that wolverine denning habitat may become limiting. Recent warming has already led to substantial reductions in spring snow cover in the mountains of western North America.¹³⁸ Numerous recent and sophisticated studies support the conclusion that climate changes caused by global climate change are likely to negatively affect wolverine habitat.¹³⁹ Protection of denning habitat may be critical for the persistence of the species.

An additional concern related to snowmobile use is that motorized access leads to increased trapping pressure (direct or indirect capture) for some furbearers that prefer more mesic habitat conditions generally found at higher elevations or in riparian habitats, such as marten, fisher, lynx, and wolverine. Trapping season for these species is limited to the winter months, and most trappers prefer the relatively easy access to suitable habitat provided by snowmobiles. Wolverine populations in small, isolated mountain ranges can be very susceptible to trapping pressure.¹⁴⁰ Trapping pressure for these species is dramatically reduced if there is less snowmobile access.

¹³⁵ K. Heinmeyer and J. Squires, Wolverine – Winter Recreation Research Project: Investigating the Interactions Between Wolverines and Winter Recreation 2014 Progress Report (Oct. 27, 2014). The 2015 Progress Report did not include an executive summary of preliminary results like in previous reports.

¹³⁶ S.J. Creel *et al.*, Snowmobile activity and glucocorticoid stress responses in wolves and elk, 16 *Conservation Biology* 809 (2002).

¹³⁷ K. Heinmeyer and J. Squires, Wolverine – Winter Recreation Research Project: Investigating the interactions between wolverines and winter recreation use 2013 Progress Report (2013).

¹³⁸ P. Mote *et al.*, Declining mountain snowpack in western North America, 86 *Bulletin of the American Meteorological Society* 1 (2005); G.T. Pederson *et al.*, A century of climate and ecosystem change in Western Montana: what do temperature trends portend? 96 *Climatic Change* (2010).

¹³⁹ P. Gonzales *et al.*, Wolverines and Climate Change, Unpublished report (2008); J.F. Brodie and E. Post, Nonlinear responses of wolverine populations to declining winter snowpack, 52 *Population Ecology* 279 (2010); J.P. Copeland *et al.*, The bioclimatic envelope of the wolverine (*Gulo gulo*): do climate constraints limit its geographic distribution? 88 *Canadian Journal of Zoology* 233 (2010); K.S. McKelvey *et al.*, Climate change predicted to shift wolverine distributions, connectivity, and dispersal corridors. 21 *Ecological Applications* 2882 (2011); S. Peacock, Projected 21st century climate change for wolverine habitats within the contiguous United States. *Environmental Research Letters* (2011); K.M. Johnston *et al.*, Projected range shifting by montane mammals under climate change: implications for Cascadia's National Parks, 3 *Ecosphere* 11 (2012).

¹⁴⁰ J.R. Squires *et al.*, Sources and patterns of wolverine mortality in western Montana, 71 *Journal of Wildlife Management* 2213 (2007).

H. Cumulative Impacts

NEPA's implementing regulations require that when agencies prepare an EIS, that document must consider the cumulative impacts of the action under consideration, and defines cumulative impacts as "the incremental impact[s] of the action when added to other past, present, and reasonably foreseeable future actions."¹⁴¹ The Agencies state the effects of past and ongoing activities are reflected in the description of existing conditions for each resource.¹⁴² This is insufficient under NEPA's requirements. "In a cumulative impacts analysis, an agency must take a 'hard look' at *all* actions" that may combine with the action under consideration to affect the environment.¹⁴³ By clumping past and present actions into the environmental baseline, the Agencies fail to take the required hard look at cumulative impacts. There is no detailed discussion about these impacts, nor is there a quantified assessment of those impacts.

The Agencies also fail to consider various cumulative impacts. As just one example, the DEIS fails to consider the cumulative impacts of climate change and forest roads (i.e., how climate change is expected to lead to more extreme weather events, resulting in increased flood severity, more frequent landslides, altered hydrographs, and changes in erosion and sedimentation rates and delivery processes).

IV. The Agencies Must Consider Induced Growth Likely to Result from Year-round Access as Part of its Hard Look

NEPA requires agencies to consider the growth-inducing effects of proposed actions.¹⁴⁴ An agency may not simply state that growth will increase with or without the project, or that development is inevitable; the agency must provide an adequate discussion of growth-inducing impacts.¹⁴⁵ Here, all of the action alternatives contemplate giving owners of Continental Mine unfettered year-round access. The Agencies must consider and disclose the extent to which this year-round access may lead to growth-inducing impacts, such as development of the mine. If so, the agencies must also consider the potential induced growth and development of Continental Mine as a connected action in this analysis.

V. We Support the No Action Alternative

¹⁴¹ 40 C.F.R. § 1508.7.

¹⁴² DEIS at 62.

¹⁴³ *Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 608 F.3d 592, 603 (9th Cir. 2010).

¹⁴⁴ 40 C.F.R. § 1508.8(b); *City of Carmel-by-the-Sea v. United States Dep't of Transp.*, 123 F.3d 1142, 1162 (9th Cir. 1997).

¹⁴⁵ *Laguna Greenbelt, Inc. v. United States Dep't of Transp.*, 42 F.3d 517, 526 (9th Cir. 1994).

Due to the significant negative impacts to wildlife and their habitat, we support the No Action alternative. Through this project proposal, the Agencies seek to undertake road construction and repair and increase motorized use in areas that contain sensitive habitat for sensitive wildlife and fish, including grizzly bears, Woodland caribou, Canada lynx, wolverine, and bull trout. By reconstructing Bog Creek Road and repairing and increasing use on Blue Joe Creek Road, the Agencies threaten to adversely modify and fragment important habitat in the project area. While the Agencies combine this proposal with the closure of other roads, most of those roads are “legacy” roads that are not currently subject to a great deal of motorized use. For example, the Proposed Action would close FSR 1322 and FSR 1332A; while not “formally closed to motorized access,” these roads are already gated and blocked with boulders.¹⁴⁶ Thus, even the closure of these roads will not fully mitigate the increased human presence, construction, and increase in motorized use in the project area.

Additionally, the DEIS states that because the current OMRD is modeled at just 14.87 percent, over 18 percent below the Access Amendment standard of 33, the No Action alternative would give the agencies motorized access flexibility throughout the BMU to accomplish law enforcement activities, as well as other land management needs.¹⁴⁷ By comparison, the Agencies would have only half as much flexibility under the action alternatives.¹⁴⁸ Thus, we believe the No Action alternative could meet the purpose and need of the project proposal.

If the Agencies approve the No Action alternative as suggested here, the Forest Service will still be responsible for complying with the Access Amendment standards, which will further benefit grizzly bears and other wildlife.¹⁴⁹ Because the Forest Service would need to comply with the Access Amendment standards under the No Action alternative, the Agencies should have evaluated road closures to comply with those standards as part of this alternative. By failing to do so, the Agencies have failed to fully analyze the No Action alternative. We request that the Agencies remedy this failure by evaluating proposed road closures to comply with the Access Amendment standards as part of the No Action alternative in a supplemental EIS.

VI. We Suggest Evaluation of Another Reasonable Alternative

Although we support the No Action alternative as stated above, we would also urge the Agencies to consider another reasonable alternative. Under our proposed alternative, the Agencies would work to close open roads and meet the Access Amendment standards before moving forward to repair and open to increased use Bog Creek and Blue Joe Creek roads. By closing roads before conducting construction and repair activities, the Agencies could lessen the negative impacts to

¹⁴⁶ *Id.* at 103.

¹⁴⁷ *Id.* at 95.

¹⁴⁸ *Id.* at 98.

¹⁴⁹ See, e.g., *id.* at 95 (explaining that under the No Action alternative, the Forest Service would continue to work toward meeting the Access Amendment standards).

wildlife by limiting where human activity is conducted in the Blue-Grass BMU. As all three action alternatives stand now, construction, repair, and closure activity all takes place during the same time over up to three years, thus unnecessarily decreasing undisturbed areas in the BMU where displaced wildlife can seek refuge. Although extending the life of the project may have some pitfalls, we believe that spreading out the impacts over a longer period of time is more beneficial than having increased human activity throughout the BMU by overlapping construction/repair work and closure work.

CEQ regulations implementing NEPA require that agencies “©igorously explore and objectively evaluate all reasonable alternatives.” 40 C.F.R. § 1502.14(a). The importance of this mandate cannot be downplayed, as a rigorous review of alternatives is considered “the heart of the environmental impact statement.” 40 C.F.R. § 1502.14. According to CEQ regulations, the ARS must “use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment.” 40 C.F.R. § 1500.1(e). Because the alternative proposed is a reasonable one and could accomplish the purpose and need of the project while simultaneously decreasing the negative impacts to wildlife, the Agencies have a duty to evaluate and analyze this reasonable alternative.

VII. The Agencies Impermissibly Eliminate a Reasonable Alternative

The alternatives analysis is the “heart” of NEPA, and therefore “an agency must *on its own initiative* study all alternatives that appear reasonable and appropriate for study at the time, and must also look into other significant alternatives that are called to its attention by other agencies, or by the public during the comment period afforded for that purpose.”¹⁵⁰ Here, the Agencies improperly eliminated viable alternatives from its analysis. As noted above, the Agencies’ latest proposal expands and alters the project by, *inter alia*, eliminating the seasonal restrictions on Bog Creek Road and Blue Joe Creek Road. An alternative reflecting the action as originally proposed during scoping in May 2016 – that would maintain season restricted designations on Bog Creek Road and Blue Joe Creek Road, limiting administrative motorized access to 57 trips per active bear year – is reasonable and should be considered in detail.¹⁵¹ Without justification or explanation, the Agencies determined that a seasonally restricted designation for Bog Creek Road would not be sufficient to ensure border security in the area. Similarly, the Agencies determined it is necessary to remove the seasonally restricted designation from the Blue Joe Creek Road without justification or explanation. There is no reasoning to explain why seasonal restrictions will prevent the Agencies from achieving the stated purpose and need for this proposal.

¹⁵⁰ Dubois v. Dep’t of Agriculture, 102 F.3d 1273, 1291 (1st Cir. 1996), quoting Seacoast Anti-Pollution League, v. Nuclear Reg. Comm’n, 598 F.2d 1221, 1231 (1st Cir. 1979) (emphasis from Dubois court) (internal citations omitted).

¹⁵¹ Id. at 36.

VIII. The Agencies Must Demonstrate Compliance with the Endangered Species Act

Section 7 of the ESA imposes a substantive obligation on federal agencies to “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of” habitat that has been designated as critical for the species. 16 U.S.C. § 1536(a)(2); *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 524 F.3d 917, 924 (9th Cir. 2008). Here, the Agencies must consult with the U.S. Fish and Wildlife Service under section 7 of the ESA as to the impacts of the project on species listed under the ESA and designated critical habitat, including grizzly bear, Canada lynx, Woodland caribou, bull trout, and wolverine (conference required). It must ensure the proposed road maintenance and use of roads will not harm listed wildlife or degrade its critical habitat.

The analysis states the Agencies initiated consultation with the FWS on April 3, 2013, and have met to discuss potential ESA issues periodically.¹⁵² The DEIS also states that a Biological Assessment is being prepared to determine whether the repair and maintenance of Bog Creek Road and motorized closure of other roads would have any effects on ESA listed species.¹⁵³ It states that results from consultation with FWS will be provided in the FEIS.¹⁵⁴

We encourage the Agencies to be transparent about any consultation process and affirmatively post all consultation documents, including any Biological Evaluations or Assessments by the Agencies, any letters seeking concurrence, and any responses or Biological Opinions from FWS. Without these records, we are unable to assess the agency’s analysis of impacts to wildlife and habitat in light of FWS’s expert opinion. Providing this information will allow the public to view these critical documents, and other documents in the project record, without the need to submit a formal Freedom of Information Act request. Without this information being publicly available during the notice and comment period, we are unable to meaningfully comment on the Agencies’ determinations or analysis.

VIII. The Agencies Must Demonstrate Compliance with the Clean Water Act

The Clean Water Act (“CWA”) establishes a comprehensive program “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters” by reducing and eventually eliminating the discharge of pollutants into those waters. 33 U.S.C. § 1251(a). The CWA program includes a regulatory scheme of permits, technology controls, and water quality-based pollution controls.

¹⁵² DEIS at 303.

¹⁵³ Id.

¹⁵⁴ Id.

States are responsible for developing water quality standards to protect the desired conditions of each waterway within a state's regulatory jurisdiction. 33 U.S.C. § 1313(c). A water quality standard includes three elements: (1) one or more designated uses, such as fish propagation; (2) numeric and narrative criteria specifying the water quality condition necessary to protect the designated uses; and (3) an antidegradation policy that ensures that uses are protected and that high quality waters will be maintained and protected. 33 U.S.C. §§ 1313(c)(2), 1313(d)(4)(B); 40 C.F.R. §§ 131.6, 131.10-12. Waters that do not meet water quality standards are deemed "water quality-limited" and placed on the CWA's § 303(d) list. States must develop total maximum daily loads ("TMDLs") for all § 303(d)-listed waterbodies to bring them back into compliance with applicable water quality standards. All federal agencies must comply with state water quality standards, including a state's antidegradation policy. 33 U.S.C. § 1323(a), Idaho Sporting Congress v. Thomas, 137 F.3d 1146 (9th Cir. 1998). Here several waters in the project area are 303(d) listed as impaired for temperature. The Agencies must ensure that the project will comply with the CWA by not causing or contributing to a violation of Idaho's water quality standards. Reliance on best management practices (BMPs) is insufficient; the Agencies must demonstrate how the project will not cause or contribution to a violation of water quality standards despite anticipated increases of sedimentation into receiving waters and a lack of future maintenance plans for these roads.


CONCLUSION

The Idaho Panhandle National Forest's current road system is over-sized and unaffordable. We strongly urge the Agencies to revise the analysis in this DEIS to provide a thoughtful, strategic approach to this proposal, reducing negative impacts from forest roads to water quality, aquatic habitats, and wildlife habitat, and improving watersheds and forest resiliency by returning expensive, deteriorating, and seldom used forest roads to the wild. At bottom, due to the significant negative impacts to wildlife and their habitat, we support the No Action alternative.

Sincerely,



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Public Policy and Montana Director
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ATTACHMENTS

Attachment A: The Wilderness Society, *Transportation Infrastructure and Access on National Forests and Grasslands: A Literature Review* (May 2014).

Attachment B: Halofsky, J.E. et al. eds., USDA, Forest Service, Pacific Northwest Research Station, *Adapting to Climate Change at Olympic National Forest and Olympic National Park*, PNW-GTR-844 (2011).

Attachment C: A. Switalski, Snowmobile Best Management Practices for Forest Service Travel Planning: A Comprehensive Literature Review and Recommendations for Management – *Wildlife*, 12 Journal of Conservation Planning 13 (2016).

All References May Be Provided Upon Request